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In the Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT
OF NEVADA

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 43 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

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INTEREST OF *AMICI CURIAE*

Amici Curiae—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming, and the Commonwealths of Kentucky, Massachusetts, Pennsylvania, and Virginia—have a significant interest in the protection of the full scope of sovereign immunity that they enjoy under the Constitution, including immunity from suits in other States' courts. Sovereign immunity is an "integral component of that 'residuary and inviolable sovereignty' retained by the States," *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751–52 (2002) (quoting The Federalist No. 39) (internal citations omitted), and prevents the subjection of a State to "the indignity of . . . the coercive process of judicial tribunals," *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quotations omitted). In addition, because money judgments "must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), the loss of a State's constitutionally protected sovereign immunity saps the State of scarce resources needed

to pursue other goals. *Alden v. Maine*, 527 U.S. 706, 750–51 (1999).

INTRODUCTION

The time has come for this Court to overrule its decision in *Nevada v. Hall*, 440 U.S. 410 (1979), an outlier among this Court's consistent protection of the States' sovereign immunity. Although this Court has held that States are immune in their own courts, in federal courts, and in federal administrative agencies, *Hall* allows a State to be haled before the courts of any other State and be forced to pay money judgments issued by those courts. This affront to the States' sovereign dignity and financial resources is contrary to the Constitution's structure and history and should be definitively rejected. For this reason, a total of forty-five States have joined briefs arguing that *Hall* should be overruled. [1]

In concluding that States are not immune from suits in the courts of other States, the *Hall* majority disregarded both the structure and the history of the Constitution. 440 U.S. at 418–27. The Court specifically declined to "infer[]" immunity "from the

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[1] Forty-four States have joined this brief, but a total of forty-five States have joined briefs supporting Petitioners and arguing that States should be immune from suit in the courts of other States. The State of South Carolina is joining with its State Port Authority in another amicus brief in support of Petitioners in this case.

structure of our Constitution and nothing else." *Id.* at 426. And while the Court acknowledged that sovereign immunity was "[u]nquestionably . . . a matter of importance in the early days of independence," it determined the founding era history to be irrelevant because "[t]he debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III," and not on "the question whether one State might be subject to suit in the Courts of another State." *Id.* at 418–19. Similarly, the Court dismissed the understanding of immunity evidenced by the history of the ratification of the Eleventh Amendment because "all of the relevant debate[] concerned questions of federal-court jurisdiction." *Id.* at 420–21.

Having dismissed the best sources for an understanding of the scope of sovereign immunity implicit in the Constitution, *Hall* instead relied on the decision of this Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), to conclude that each State had the authority to choose not to extend immunity to other States. 440 U.S. at 416–18. *Hall* read *The Schooner Exchange* to stand for the proposition that sovereign nations can decide whether they will accord immunity to other nations. *Ibid.* Reasoning that the relationship between States resembles the relationship between nations, *Hall* held that only principles of comity prevented one State from being sued in the courts of another. *Id.* at 417–18, 421. But the Court admitted that this

rule would not have applied if it had found "a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418.

Hall also speculated that the States might be immune from suit in some cases but provided no clear guidance to identify those cases. The Court explained only that there could be some limitation where a suit in an out-of-State court poses a "substantial threat to our constitutional system of cooperative federalism," but did not elaborate further. *Id.* at 424 n.24.

The *Hall* decision prompted well-reasoned dissenting opinions by Justice Blackmun and Justice Rehnquist. Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, explained that "[t]he Court's expansive logic and broad holding—that so far as the Constitution is concerned, State A can be sued in State B on the same terms any other litigant can be sued—will place severe strains on our system of cooperative federalism." *Id.* at 429. Pointing to "[t]he prompt passage of the Eleventh Amendment nullifying the decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793)," Justice Blackmun reasoned that "the Framers must have assumed that States were immune from suit in the courts of their sister States." *Id.* at 430–31. Put another way, "[t]he only reason why this immunity did not receive

specific mention is that it was too obvious to deserve mention." *Id.* at 431.

Justice Rehnquist, joined by Chief Justice Burger, argued that the Court's decision "works a fundamental readjustment of interstate relationships which is impossible to reconcile not only with an 'assumption' this and other courts have entertained for almost 200 years, but also with express holdings of this Court and the logic of the constitutional plan itself." *Id.* at 432-35 (citing both the Eleventh Amendment and the founding-era decision in *Nathan v. Virginia*, 1 Dall. 77 (1781)). Justice Rehnquist also noted the irony of holding that States that are constitutionally immune from suits by other States' citizens in "neutral" federal courts could, under the majority's opinion, be haled into the more-likely-biased courts of their sister States. *Id.* at 442.

This Court's modern sovereign immunity case law demonstrates that *Hall* was wrongly decided, and that the dissenters were entirely correct. Specifically, this Court's post-*Hall* decisions require a searching examination of the Constitution's structure and history in order to determine the extent of the States' sovereign immunity, as that immunity was understood at the founding. *Alden*, 527 U.S. at 727–28. That analysis leads to the unmistakable conclusion that States are constitutionally immune from lawsuits brought in the courts of other States.

SUMMARY OF ARGUMENT

I. Under this Court's post-*Hall* case law, it is clear that the Constitution's structure extends the States' sovereign immunity to suits brought in other States' courts. As this Court has emphasized in recent years, see, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 723–24 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 70 (1996), the swift reversal of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), by the Eleventh Amendment highlights that the founding generation understood the Constitution's structure as broadly protecting the States' sovereign immunity. And it follows that States should also be immune from non-consensual suit in the courts of their sister States. Otherwise, the immunity implicit in the Constitution's structure would prohibit suits against States brought by other States' citizens in the more neutral federal courts, while nonsensically permitting those same out-of-state citizens to bring the same suits in their friendlier home-state courts.

II. "[H]istory and experience, and the established order of things," also strongly support the States' sovereign immunity from suits in other States' courts. *Alden*, 527 U.S. at 727 (quotations omitted). At the time of the founding, it was broadly accepted that the sovereign States were immune from lawsuits in *any* courts, including other States' courts. This view was most clearly demonstrated by the founding-era decision in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781), but is also clear from other founding-era statements and a leading treatise on

international law. While there was no specific debate among the Founders about the abrogation of the States' immunity in the courts of other States, the explanation of the *Hall* dissenters makes the most sense: such immunity was so well established that no one conceived it would be altered by the Constitution.

III. For the past thirty-five years, *Hall*'s error has imposed substantial harm upon the sovereign States. As detailed below, state courts have imposed financially burdensome judgments on other States and their agencies. Many of these cases involved intrusions into core areas of State policy, while all such cases violated the States' sovereign rights and dignities. The present case, in which a California state agency has been dragged through Nevada court for fifteen years, all for enforcing the State of California's tax policy, starkly illustrates the need for this Court to overrule *Hall*.

IV. Finally, at least two other considerations warrant overruling *Hall*. *First*, while the *Hall* majority suggested that another State's exercise of jurisdiction might be limited where there is a threat to Our Federalism, that hypothetical limitation fails to provide adequate protection. *Second*, the rule in *Nevada v. Hall* is not necessary to ensure that injured parties can seek relief because States can reach agreements consenting to suit in each others' courts.

ARGUMENT

I. THE CONSTITUTION'S STRUCTURE PROTECTS EVERY STATE'S SOVEREIGN RIGHT TO ASSERT IMMUNITY IN ITS SISTER STATES' COURTS

A. The States' immunity from suit inheres in the Constitution's structure. As this Court's recent decisions have repeatedly confirmed, the sovereign immunity of the States is implicit in "the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999); see also, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997) (explaining that a "broader concept of immunity" is "implicit in the Constitution"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (confirming that the Eleventh Amendment is important for "the presupposition . . . which it confirms" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))). This constitutional immunity is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713; see also *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) ("The Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework.").

Consistent with the view taken by Justice Blackmun's and Justice Rehnquist's *Hall* dissents,

this Court's modern sovereign immunity decisions have explained that this structural protection is most evident in the founding generation's reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Holding that a private citizen could sue a State in federal court, *id.* at 450–53 (Blair, J.); *id.* at 468 (Cushing, J.); *id.* at 461–66 (Wilson, J.); *id.* at 478–79 (Jay, C.J.), that decision "fell upon the country with a profound shock," *Alden*, 527 U.S. at 720 (quoting 1 C. Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)). In response and with almost unanimous votes after a single day of discussions, both Houses of Congress quickly approved the Eleventh Amendment, which provides that the power of the federal courts will not be construed to extend to a suit brought by a citizen of one State against another State. *Id.* at 721. The States promptly ratified the Amendment. *Fed. Mar. Comm'n*, 535 U.S. at 752.

As this Court's post-*Hall* decisions have explained, the "natural inference" from the circumstances surrounding the Eleventh Amendment's adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724. While the text of the Eleventh Amendment did not "codify[] the traditional understanding of sovereign immunity," *id.* at 723, this Court has recognized that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh

Amendment," *id.* at 713; see also *Seminole Tribe of Florida*, 517 U.S. at 70. Instead, the Eleventh Amendment points to "the broader concept of immunity, implicit in the Constitution." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267–68; see also *Fed. Mar. Comm'n*, 535 U.S. at 753 (acknowledging that "the Eleventh Amendment . . . is but one particular exemplification of [the States'] immunity"); *Blatchford*, 501 U.S. at 779 (confirming that the Eleventh Amendment is important because of "the presupposition of our Constitution which it confirms: that the States entered the federal system with their sovereignty intact").

B. For at least two reasons, the immunity implicit in the Constitution's structure includes immunity for States from suits brought in other States' courts.

First, this Court's post-*Hall* understanding of the Eleventh Amendment and the Constitution's structure would make little sense if States could be sued in the courts of other States without consent. If the immunity implicit in the Constitution requires broadly construing the Eleventh Amendment to prohibit all non-consensual suits brought against a State in federal court by a citizen of another State, it logically follows that States should also be immune from suit in the potentially biased courts of other States. U.S. Const. amend. XI. Otherwise, the States would have "perversely foreclosed the neutral federal forums only to be left to defend suits in the

courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting).

Second, several constitutional provisions evince a design by the founders to ensure the availability of a "neutral" federal forum for those cases in which a State is properly a party. *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting); cf. Amy Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 259–63. This Court has original jurisdiction over suits between two or more States. U.S. Const. art. III, § 2, cls. 1–2. And the federal courts have jurisdiction over consensual suits "between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. As recognized by Edmund Randolph, the first Attorney General of the United States, implicit in this design is the understanding that States have the right to assert immunity in the courts of other States. In his 1790 Report on the Judiciary to the House of Representatives, Randolph explained that the Constitution confirmed that the States would remain immune from suits in the courts of others States "by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 130 (Maeva Marcus, ed., 1992).

II. THE PRE-RATIFICATION HISTORY OF THE STATES' SOVEREIGN IMMUNITY MAKES PLAIN THAT THIS IMMUNITY EXTENDS TO SUITS BROUGHT IN ANY FOREIGN COURTS, INCLUDING STATE COURTS

A. "[H]istory and experience, and the established order of things" are also relevant to the scope of the States' sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). The States retain the immunity that they "enjoyed before the ratification of the Constitution . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. To determine the scope of the States' immunity, this Court has thus examined historical evidence, including "the ratification debates and the events leading to the adoption of the Eleventh Amendment," which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726.

Both before and after *Hall*, this Court has relied on ratification debates and other historical evidence to determine the scope of the States' immunity in a number of contexts not specifically addressed in those debates. *Alden*, 527 U.S. at 716–17. For instance, although the ratification debates focused on whether a State could be sued by *an individual*, this Court has relied on evidence of the understanding of immunity at the time of ratification to conclude that a State is immune from suits by federal corporations, *Smith v. Reeves*, 178 U.S. 436, 447–49 (1900), foreign

nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–32 (1934), and Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779–82 (1991). And although the ratification debates centered on the question of the States' immunity from suit *in federal courts*, this Court has relied on evidence of the understanding of immunity at the time of ratification to conclude that States are immune from suits in their own state courts, *Alden*, 527 U.S. at 741–43, and in federal administrative agencies, *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 754–61 (2002). *Hall*'s refusal to consider evidence of the understanding of sovereign immunity at the founding, as well as its dismissal of the ratification debates because those debates focused on questions of federal jurisdiction, cannot be reconciled with this approach. 440 U.S. at 418–20.

B. A review of the historical evidence reveals that the States' immunity from suit in the courts of sister States was assumed at the time of ratification.

Immunity from suit was an essential attribute of sovereignty at the founding. *Alden*, 527 U.S. at 714–15. Absolute immunity from suit in the absence of consent inhered in the nature of sovereignty under English law. *Ibid.* Blackstone, "whose works constituted the preeminent authority on English law for the founding generation," *id.* at 715, explained that "no suit or action can be brought against the king, even in civil matters, because no court can have

jurisdiction over him." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765). The leading treatise on international law at the time took the same approach, explaining that "[o]ne sovereign cannot make himself the judge of the conduct of another." Emmerich de Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 155 (Book II, Ch. 4, § 55) (J. Chitty ed., 1883).[2] This was accepted wisdom by the States at the time of the founding: "[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden*, 527 U.S. at 715–16.

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[2] James Madison relied on Vattel as an authoritative source of the law of nations, *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed., 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1111311113&sa=&r=36&sr=, and Thomas Jefferson explained that Vattel "ha[d] been most generally the guide" on the "law of nations," *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 7, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed. 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1311311113&sa=&r=96&sr=. Vattel was also cited in two of the State conventions to ratify the Constitution. 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 454 (hereinafter Elliot's Debates) (James Wilson citing Vattel at the Pennsylvania ratification convention); 4 Elliot's Debates 278 (Charles Pinckney explaining at the South Carolina ratification convention that Vattel was "one of the best writers on the law of nations").

Most relevant for the present case, the pre-ratification understanding of the sovereign immunity enjoyed by States extended to cases brought in the courts of their sister States. The decision of the Pennsylvania Court of Common Pleas in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781), is particularly instructive. In that case, a citizen of Pennsylvania sought to attach property of Virginia located in Philadelphia Harbor. *Id.* at 77–78. The Attorney General of Pennsylvania argued "[t]hat a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws." *Id.* at 78. The Pennsylvania Court of Common Pleas agreed, holding that Virginia was immune. *Id.* at 80.

Nathan was well-known at the time of the founding. While the case was pending, the Virginia delegates to the Confederation Congress, including James Madison, wrote a letter that argued for the dismissal of the case because it required Virginia to risk its property without appearing or to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), *reprinted in* 3 The Papers of James Madison 184 (William T.

Hutchinson et. al. eds., 1963).[3] The Virginia delegates explained that allowing the suit to proceed would be "derogatory to the Rights of Sovereignty of the State of Virginia." *Ibid.*[4] Later, the Attorney General of Virginia, Edmund Randolph, appointed John Marshall as one of two arbitrators, pursuant to a resolution of the Virginia General Assembly, to resolve the dispute between Virginia and Nathan after the Pennsylvania court dismissed Nathan's suit. 8 THE PAPERS OF JAMES MADISON 68 n.1 (Robert A. Rutland et al. ed., 1973).[5] And four years later, the decision of the Pennsylvania court to dismiss was published in the first volume of the United States Reports. 1 U.S. (1 Dall.) at 77.

Though there was no specific consideration of the question, statements during the ratification debates confirm that the States' immunity continued to be understood to include immunity from suit in the courts of other States. Advocates of the Constitution

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[3] This letter may be found at Founders Online, National Archives, http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=14&sr=.

[4] The delegates noted that even if Nathan could not bring his action in Virginia's courts, "still the Case would not be without Remedy; as on Petition to the Legislature, the supreme Authority of the State, it would no doubt be attended to, and redressed." *Ibid.*

[5] This source may be accessed at http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=38&sr=.

spoke in broad terms that presumed immunity in *all* courts, unless expressly surrendered, when they assured the people that the States would be immune from suit in federal court. Alexander Hamilton explained that immunity from the suit of an individual was "inherent in the nature of sovereignty." The Federalist No. 81, p. 486 (C. Rossiter ed., 1961). Hamilton went on to explain that immunity was "now enjoyed . . . by every State in the Union" and that unless "there is a surrender of this immunity in the plan of the convention, it will remain with the States." *Id.* at 487. James Madison assured the Virginia Convention that "[i]t is not in the power of individuals to call any state into court," and John Marshall assured that Convention that "[i]t is not rational to suppose that the sovereign power Should be dragged before a court." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 533, 555 (J. Elliot 2d. ed. 1836) (hereinafter Elliot's Debates).

Even the few Federalists who believed that Article III abrogated the States' immunity in federal courts shared the understanding that the States would still be immune from suit in the courts of sister States. One prominent supporter of permitting suits against States in federal court premised his argument on the continued immunity of States in the courts of other States. Edmund Pendleton argued to the Virginia Convention that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state[] shows

the propriety and necessity of vesting [a federal] tribunal with the decision of controversies to which a state shall be a party." 3 Elliot's Debates 549.

Attorney General Randolph's report on the judiciary to the House of Representatives—delivered shortly after the ratification of the Constitution—is yet more evidence that the States were understood to have retained immunity under the Constitution from suit in the courts of other States. Randolph believed the immunity of a State in the courts of another State to be as settled a principle as immunity of the United States itself from suits in state courts. "In like manner," he confirmed that "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 130 (Maeva Marcus, ed., 1992). He explained that the "unconfederated" States "would be as free from mutual control as other disjoined nations." *Ibid.* Nothing in the Constitution "narrow[ed] this exemption." *Ibid.*

This historical evidence demonstrates that *Hall*'s claim that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified," 440 U.S. at 418–19, is true in only one sense. "[T]he framers would not have thought such suits possible, and therefore were not worried that they would occur." Amy Woolhandler, *Interstate Sovereign*

Immunity, 2006 Sup. Ct. Rev. 249, 252. In short, "[t]he only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). As even *Hall* recognized, "the doctrine of sovereign immunity was a matter of importance in the early days of independence," and many States were concerned about being sued in the courts of another sovereign because they "were heavily indebted as a result of the Revolutionary War." 440 U.S. at 418. Given the "well-known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is [thus] most instructive." *Alden*, 527 U.S. at 741. The best explanation for the lack of specific debate about the abrogation of the States' immunity in the courts of other States is that this immunity "was a principle so well established that no one conceived it would be altered by the new Constitution." *Ibid.*

In fact, the question of a State's immunity in the courts of another State was so well understood from the time of the founding going forward that this Court's decisions prior to *Hall* routinely described the States' immunity in such terms. This Court explained in 1857 that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (emphasis added); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883)

(explaining that the States are immune from suit in "any court in this country"). In *Hans v. Louisiana*, this Court explained that "[t]he suability of a state, without its consent, was a thing unknown to the law." 134 U.S. 1, 16 (1890). And again in 1961, less than two decades before *Hall*, this Court explained specifically that state courts had "no power to bring other States before them." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961).

Even *The Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116 (1812), on which *Hall* relied, supports a broad historical understanding of the immunity of the States. In *The Schooner Exchange*, the Supreme Court explained that a sovereign exercises absolute territorial jurisdiction, and that any exceptions to such jurisdiction must be "traced up to the consent of the nation itself." 7 Cranch at 136. The Court further explained, however, that such consent may be implied from the common "usages and received obligations of the civilized world." *Id.* at 137. And those usages and obligations dictated that foreign sovereigns, foreign ministers, and foreign armies with a right of passage are all understood to enter territory on an implicit understanding that they will be immune from suit. *Id.* at 137–41. In *The Schooner Exchange*, the Court extended that understanding of immunity from jurisdiction to a French ship of war that had come into an American port under friendly circumstances. *Id.* at 145–46.

Hall's reliance on *The Schooner Exchange* was misplaced. It correctly read *The Schooner Exchange* for the proposition that States, like other sovereign entities, can expressly choose to grant immunity from the jurisdiction of their courts. It also correctly recognized that there may be other sources of immunity, such as "a federal rule of law implicit in the Constitution." *Hall*, 440 U.S. at 418. The mistake of the *Hall* majority was its failure to recognize the constitutional rule. As explained above, the historical understanding of the immunity retained by the States under the Constitution establishes that each State is constitutionally immune from suit in the courts of other States.

III. THE DENIAL OF THE STATES' SOVEREIGN IMMUNITY HAS IMPOSED SUBSTANTIAL COSTS UPON THE STATES AND THEIR CITIZENS

A. Limitations on the States' sovereign immunity "denigrates the separate sovereignty of the States." *Alden v. Maine*, 527 U.S. 706, 749 (1999). Sovereign immunity "accords the States the respect owed them." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Failure to accord this immunity subjects a State to "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties," *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)), and allows for "unanticipated intervention in the processes of government," *id.* at 750 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

This indignity is suffered "regardless of the forum," *Alden*, 527 U.S. at 749, though it is particularly harmful to permit a court from one State to subject another State to suit. An exercise of jurisdiction over a State by another State allows the courts of the second State to decide what policy goals the first State should pursue and how it should pursue those goals. These out-of-State suits "place an unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Id.* at 750–51. States can be "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests" in important areas of policy. *Ibid.* (quoting *In re Ayers*, 123 U.S. at 505). And the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, fisc, and policy priorities.

These harms occur whether a suit seeks to enjoin a State's policies or to recover a money judgment. States must use scarce resources to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political judgments must be made." *Alden*, 527 U.S. at 751. The imposition of a money judgment against a State's treasury diminishes the available resources by judicial fiat, and thereby undermines the State's ability to reach a "balance between competing interests . . . after deliberation by the political process established by the citizens of the State."

Ibid. In short, refusal to recognize the States' sovereign immunity from damage suits deprives the States of needed resources to pursue their own democratically determined objectives.

B. Since this Court's *Hall* decision, state courts throughout the country have imposed just such sovereign harms upon unconsenting States.

A number of state courts have exercised jurisdiction in cases that involve sensitive policy decisions of another State. For example, in *Faulkner v. University of Tennessee*, 627 So.2d 362 (Ala. 1992), the Supreme Court of Alabama held that Alabama courts would review the application of educational standards at a university operated by another State. A resident of Alabama sued the University of Tennessee for the withdrawal of a degree. After a faculty panel concluded that the student's dissertation did not meet the requirements for a doctorate, the student refused an administrative hearing in Tennessee and instead sued the University of Tennessee in Alabama state court. *Id.* at 363–64. The Alabama Supreme Court allowed the suit for money damages, injunctive relief, and declaratory relief to proceed, refusing to extend to the University of Tennessee the same immunity that an instrumentality of Alabama would receive. *Id.* at 364–66.

State courts have also permitted suits against other States based upon those States' law

enforcement policies. In *Head v. Platte County, Missouri*, 749 P.2d 6, 7–8 & 10 (Kan. 1988), a resident of Kansas sued a political subdivision and officer of Missouri for policies related to arrest warrants. The Kansas resident alleged that she had suffered injuries due to a failure by the Missouri entity to adequately train employees and a failure "to establish and implement policies concerning the filing and execution of arrest warrants." *Id.* at 8. The Kansas court decided to exercise jurisdiction based in part on the conclusion that "Kansas courts should give primary regard to the rights of its own citizens and persons within the protection of this state" instead of the sovereign interest of other States. *Id.* at 10. Similarly, in *Mianecki v. Second Judicial District Court*, 658 P.2d 422, 423 (Nev. 1983), the Wisconsin Department of Corrections permitted a sex offender on probation to move to Nevada. When the probationer committed a sexual assault, the victim sued Wisconsin for failure to warn and failure to supervise the probationer. *Ibid.* The Nevada Supreme Court explained that Nevada courts should review Wisconsin's supervision of the probationer because "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity." *Id.* at 425.

Finally, numerous money judgments have been entered against States or state entities by the courts

of other States. *Struebin v. Illinois*, 421 N.W.2d 874 (Iowa 1988), provides a particularly striking example. In that case, the Supreme Court of Iowa permitted two estates to sue Illinois for alleged negligent maintenance of a portion of interstate highway in Iowa that Illinois had agreed to maintain in an interstate compact. *Id.* at 875. An Iowa trial court entered two judgments against the State of Illinois totaling $118,800. *Ibid.* After the Illinois Court of Claims denied recovery on the judgment because recovery from the State was time barred under Illinois law, the Supreme Court of Iowa affirmed a garnishment of taxes owed to State of Illinois by an Illinois corporation with a plant in Iowa. *Id.* at 875–77; *Struebin v. Illinois*, 383 N.W.2d 516, 517 (Iowa 1986). The Iowa Supreme Court concluded that "garnishment of tax revenues is not an interference with Illinois' sovereign power to levy and distribute taxes" and that "there [was] no interference with Illinois['] sovereign power to tax." *Struebin*, 421 N.W.2d at 876; see also *Reynolds v. Lancaster Cnty. Prison*, 739 A.2d 413, 417 (N.J. App. Ct. 1999) (multi-million dollar verdict against a Pennsylvania prison); *Kent Cnty. v. Shepherd*, 713 A.2d 290, 304 (Del. 1998) ($600,000 judgment against the State of Maryland after an accident involving a deputy sheriff); *Laconis v. Burlington Cnty. Bridge Comm'n*, 583 A.2d 1218, 1220–23 (Pa. Super. Ct. 1990) ($1.75 million damages judgment against a subdivision of New Jersey in a case arising from bridge maintenance); *Hernandez v. City of Salt Lake*, 686 P.2d 251, 506–08 (Nev. 1984) ($225,000

judgment against a subdivision of Utah after an arrest and imprisonment).

C. This case—in which a California state agency has been subject to litigation in an out-of-State court for more than 15 years—is a case study in the harms imposed on States by the denial of immunity in courts in other States.

The Franchise Tax Board of California ("FTB") conducts audits to enforce California's income tax on its residents, and did so here after Gilbert Hyatt purported to move out of the State. Specifically, Hyatt filed a tax return with California in 1991 in which he claimed that he moved to Nevada and ceased to be a resident of California days before he received substantial patent licensing fees. Pet. App. at 4. Hyatt did not report the licensing fees on his tax return. *Ibid.* These discrepancies caused FTB to initiate an audit of Hyatt's 1991 tax return. *Ibid.* That audit concluded that Hyatt had not moved to Nevada until April 1992 but had staged an earlier move to avoid California's income tax for his patent licensing income. *Id.* at 6. FTB determined that Hyatt owed California $1.8 million in taxes from 1991 and added $2.6 million in penalties for fraud and interest. *Ibid.* A second audit found that Hyatt owed $6 million in taxes for 1992. *Id.* at 7.

Hyatt contested FTB's actions. But he did not limit that challenge to California's procedure for administrative review of tax audits. Pet. App. at 7.

Instead, Hyatt also sued FTB in Nevada court seeking declaratory relief, compensatory damages, and punitive damages for several alleged intentional torts. *Id.* at 7–8, 11.

FTB received less favorable treatment in the courts of Nevada than it would have received in its own courts. Although FTB would be completely immune from suit for an audit in California court, Cal. Gov't Code § 860.2, the Nevada courts denied complete immunity to FTB. Pet. App. 10. Instead, the Supreme Court of Nevada held that California was entitled to "partial immunity equal to the immunity a Nevada government agency would receive" in a Nevada court. *Ibid.*

On a writ of certiorari, this Court agreed that the Full Faith and Credit Clause did not require Nevada to extend to FTB the full immunity that the agency would have received in a California court, *Franchise Tax Bd. of California v. Hyatt* ("*Hyatt I*"), 538 U.S. 488 (2003), although several Justices questioned whether the Court's recent decisions suggested that FTB should have sovereign immunity from suit in an out-of-State court, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42). The Court recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," but it struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in

tort claims . . . arising out of its tax collection agency's residency audit." *Hyatt I*, 538 U.S. at 498. The Court thus concluded that "[t]he Nevada Supreme Court [had] sensitively applied principles of comity." *Id.* at 499. At oral argument, some Justices suggested that *Hall* might no longer be viable and that sovereign immunity might be available, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42), but the Court declined to address the question because FTB did not ask it to do so at the time. *Hyatt I*, 538 U.S. at 497.

When the case returned to the Nevada courts, matters worsened for FTB. The California state agency did not even continue to receive the same treatment that a Nevada state agency would have received. A Nevada trial court conducted a four-month trial several years after this Court's decision. At the end of that trial, the Nevada trial court ruled for Hyatt on each of his intentional tort claims. Pet. App. [illegible]. And although Nevada law would have limited damages against Nevada and barred punitive damages, Nev. Rev. Stat. § 41.035, the Nevada trial court awarded almost half a billion dollars to Hyatt, including a $250 million punitive damages award and a compensatory damages award in excess of the statutory cap. Pet. App. 11.

When this case returned to the Supreme Court of Nevada, that court agreed with the trial court's refusal to extend to FTB the compensatory damages cap that would have applied to the State of Nevada's

agencies. Although it ruled for the California state agency on several of Hyatt's claims and struck the punitive damages award, the Nevada Supreme Court affirmed the imposition of damages exceeding the statutory cap because Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity." Pet. App. at 45. The court did not consider California's interest in the enforcement of its tax laws. *Id.* at 42–46.

This case highlights all of the harms that could befall a State under *Nevada v. Hall*. After more than a decade and a half of costly litigation, California is now liable for a judgment of over a million dollars for fraud and must endure another trial to decide damages on a claim of intentional infliction of emotional distress. Pet App. at 72. Moreover, the success of this litigation has encouraged similar suits, which may force FTB to alter its procedures for enforcing California's tax policies. Pet. at 32–33.

IV. ADDITIONAL CONSIDERATIONS MILITATE IN FAVOR OF OVERRULING *HALL*

A. *Hall* suggested that some of the problems of permitting unconsented suits against a State in the courts of another State could be avoided by limiting another State's exercise of jurisdiction to situations that "pose[] no substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979). But *Hall*'s hypothetical preservation of immunity fails,

for at least two reasons, to provide adequate protection to the States from the costs imposed by suits in the courts of other States.

First, no clear standard can establish which cases pose a "substantial threat" to cooperative federalism. See *Hall*, 440 U.S. at 429 (Blackmun, J. dissenting) ("[I]t is hard to see just how the Court could use a different analysis or reach a different result in a different case."); *id.* at 442–43 (Rehnquist, J., dissenting) ("I do not see how the Court's suggestion that limits on state-court jurisdiction may be found in principles of 'cooperative federalism' can be taken seriously."). As explained above, this Court has already examined the possibility of such a distinction under the Full Faith and Credit Clause *in this very case* but failed to find a "principled distinction" between cases that pose a substantial threat and those that do not. *Hyatt I*, 538 U.S. 488, 498 (2003). After all, *every* case brought in the court of another State undermines a State's sovereignty. See pp. 21–22, *supra*.

Second, even if this Court could devise a standard to distinguish between cases that pose a substantial threat to cooperative federalism and those that pose a lesser threat, that standard is unlikely to be enforced rigorously, if at all. A state court in another State has an undeniable incentive to be less than diligent in applying such a standard in any case involving relief for that other State or its citizens, as most of these out-of-State suits do. And

this Court would be the only neutral arbiter to review such assumptions of jurisdiction—a relatively distant and illusory threat for a local trial court.

B. The rule in *Nevada v. Hall* also is not necessary to ensure that injured parties can seek relief. Sovereign immunity "bars suits only in the absence of consent." *Alden v. Maine*, 527 U.S. 706, 755 (1999). Although this Court has held that States are immune from suit in their own courts, *id.*, at 741–43, many States have already chosen to waive their immunity in their own courts in some circumstances. *E.g.*, Alaska Stat. §§ 09.50.250 et seq.; Fla. Stat. Ann. § 768.28; Ky. Rev. Stat. §§ 44.070 et seq.; Neb. Rev. St. §§81-8,209 et seq.; S.C. Code Ann. §§ 15-78-10 et seq.; W. Va. Code §§ 14-2-1 et seq. This waiver permits injured individuals to receive compensation without injuring the sovereignty of the States.

States could even choose to consent to suits in the courts of other States and might agree to submit to suits in each other's courts. Importantly, any decision to consent to suit in any court would be made by the States as sovereigns instead of by judicial fiat.

* * *

This Court should overturn *Nevada v. Hall* and return to the States the immunity from suit in the courts of other States that is implicit in the Constitution and consistent with the pre-ratification

history. Because this immunity from suit is important to the sovereign interests of the States, forty-five States have joined this brief in support of overruling *Hall* and a total of forty-five States have joined briefs that argue that *Hall* should be overruled. See p. 1 n.1, *supra*.

CONCLUSION

The decision of the Supreme Court of Nevada should be reversed.

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